STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2005
v	No. 251578 Oakland Circuit Court
CARL S. HARRIS, Defendant-Appellant.	LC No. 00-174820-FH

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for conspiracy to deliver between 50 and 225 grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(iii), delivery of between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of under twenty-five grams of cocaine, MCL 333.7403(2)(a)(5). Defendant was sentenced to 8 to 20 years' imprisonment for both the conspiracy and delivery convictions and 6 months to 4 years' imprisonment for the possession conviction. We affirm.

Defendant first argues that evidence obtained from his arrest should have been suppressed because the police did not have probable cause to arrest him. Defendant preserved this issue by filing a motion to suppress the evidence. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A trial court's findings of fact in a suppression hearing are reviewed for clear error; however, its ultimate decision on a motion to suppress is reviewed de novo. *People v Dunbar* (*After Remand*), 264 Mich App 240, 243; 690 NW2d 476 (2004). The lower court docket sheet shows that the trial court took defendant's motion under advisement, but does not indicate how it disposed of the motion. At trial, evidence obtained as a result of defendant's arrest was admitted without objection.

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. In general, seizures are constitutionally reasonable only if they are based on probable cause. US Const, Am IV; Const 1963, art 1, §11. Probable cause to arrest exists when the facts and circumstances within the officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed. *Dunbar*, *supra* at 250. If a felony has been committed and there exists probable cause to believe that the defendant committed the felony, police may arrest an individual without a warrant. *Id.* Further, while investigating the perimeter of a crime scene, the police are permitted to apprehend

suspicious persons and take them into custody while the matter is investigated. See *People v Lewis*, 251 Mich App 58, 70; 649 NW2d 792 (2002) (articulable reasonable suspicion may be adduced from nervous and evasive behavior); *People v Shields*, 200 Mich App 554, 557-558; 504 NW2d 711 (1993) (it was reasonable to stop the defendant when he attempted to move his vehicle from in front of a known drug house as it was being raided).

We find that the trial court did not abuse its discretion in admitting evidence obtained as a result of defendant's arrest because the police had probable cause to arrest defendant. Based on information from a police informant, Randall Beninati, the police were aware that on August 31, 2002, a sale of two ounces of cocaine was planned to occur at a Chi-Chi's restaurant in Macomb County. The police watched Beninati's cocaine supplier, Jerome Bolton, enter the Chi-Chi's restaurant and meet an individual named John Sellors. The police determined that Sellors had driven a Mercedes to the restaurant and began to watch the Mercedes. They saw defendant walk across the parking lot from a gas station and get into Sellors' Mercedes. At some point, Sellors left the restaurant and got into his Mercedes, and Sellors and defendant engaged in a conversation inside the car. After a few minutes, Sellors went back into the restaurant while defendant remained in Sellors' vehicle, looking around. Sellors came back out of the restaurant and got back into the car. Shortly thereafter, defendant left Sellors' vehicle and the arrests were made. Based on all this information, the police had probable cause to believe that a crime was being committed. Specifically, based on Beninati's information and defendant's conduct, the police had probable cause to believe that defendant was involved in selling cocaine. Defendant was a suspicious person in an area where the police were investigating a suspected crime. The facts and circumstances warranted the officers' belief that an offense was being committed, and the trial court did not abuse its discretion in admitting evidence obtained as a result of defendant's arrest.

Defendant next argues that the trial court erred in denying his motion for a directed verdict. This Court reviews de novo a trial court's decision on a motion for directed verdict by examining the record de novo to determine whether it could persuade a reasonable finder of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "'[F]actual conflicts are to be viewed in a light favorable to the prosecution.'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A reviewing court must consider not whether there was any evidence to support the conviction, but rather whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Id.*

Defendant was convicted of conspiracy to deliver between 50 and 225 grams of cocaine. To be convicted of conspiracy to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Mass*, 464 Mich 615, 623-624; 628 NW2d 540 (2001), citing *People v Justice* (*After Remand*), 454 Mich 334, 349; 562 NW2d 652 (1997). The prosecutor must only prove that the defendant cooperated in furthering the conspiracy's objective with knowledge that a conspiracy existed. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995). Circumstantial evidence and

reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). This Court should not interfere with the jury's role in determining the weight of evidence or the credibility of a witness. *Wolfe*, *supra* at 514. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Defendant argues that there was insufficient evidence for a jury to find that he was involved in a conspiracy to deliver cocaine. We disagree. The evidence at trial revealed that the police had information that there was going to be a cocaine deal at Chi Chi's. Sellors and defendant had a conversation in Sellors' vehicle in the restaurant's parking lot. Then Sellors left his vehicle and returned into the restaurant, while defendant waited in the vehicle looking around. Sellors returned to the vehicle and defendant left shortly thereafter. When the police arrested defendant, he had in his possession $2,200 in marked currency and cocaine. The evidence permits the inference that defendant supplied the cocaine that was purchased. Viewing the evidence in a light most favorable to the prosecution, it is sufficient to permit a jury to find that defendant knew that there was a conspiracy to deliver cocaine.

Defendant also argues that there was insufficient evidence regarding the quantity of cocaine that was involved. Defendant argues that because Bolton admitted that he took cocaine from the amount he delivered and substituted it with "cut," it cannot be concluded that he delivered over fifty grams of cocaine. Bolton testified that he asked Sellors to purchase two ounces (56.70 grams) of cocaine. Bolton stated that he put fourteen grams of Inisitol into the cocaine and took out approximately as much cocaine. The quantity of cocaine confiscated from Beninati after the arrests was 51.94 grams. The quantity of cocaine found on Bolton was 13.64 grams. Removing the fourteen grams of "cut" from the cocaine given to Beninati would leave 37.94 grams; adding back the 13.64 grams he removed from the cocaine would total 51.58 grams, an amount over fifty grams. Plus, Bolton stated that Sellors also took some for himself. Sellors was arrested with a small packet of cocaine weighing 1.34 grams, and his contact lens case contained 2.36 grams of cocaine. In light of this evidence, there was sufficient evidence that the amount of cocaine involved in the delivery was over fifty grams.

Defendant next argues that the trial court reversibly erred by failing to properly instruct the jury on the conspiracy charge. Specifically, defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of conspiracy to deliver less than fifty grams of a controlled substance. To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates. MCR 2.515(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Defendant did not object to the instructions below. Because defendant did not preserve this issue for appeal, we review the issue for plain error affecting substantial rights. *Id.* We conclude that there was no plain error in this case.

We review de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are to be read in their entirety rather than extracted piecemeal to establish error. *Aldrich*, *supra* at 124. "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* To warrant reversal of a conviction based on the failure to instruct the jury on a lesser included offense, a defendant must show that it is more probable than not that the failure to give the requested lesser included offense instruction

undermined reliability in the verdict. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002); *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

There are two types of lesser included offenses: necessarily included lesser offenses and cognate lesser offenses. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). A necessarily included lesser offense is an offense in which it is impossible to commit the greater offense without first having committed the lesser. *Id.* A lesser included offense is a cognate lesser offense if it is in the same class or category as the greater offense, sharing some of its elements, but it is possible to commit the greater offense without necessarily committing all the elements of the lesser offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). The trial court is only required to instruct the jury on a necessarily included lesser offense if there is a disputed factual element in the greater offense that is not included in the lesser offense and a rational view of the evidence would support it. *Cornell, supra* at 357. Our Supreme Court has interpreted MCL 768.32, the statute that governs inferior-offense instructions, as prohibiting a trial court from giving instructions on cognate lesser offenses. *Id.* at 359.

While delivery of lesser amounts of cocaine are crimes within the same category as delivery of over fifty grams of cocaine and share some elements with the greater offense, they also contain essential elements not present in the greater offense, specifically the proof of lesser quantities of controlled substances. MCL 333.7401(1); *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989). Thus, conspiracy to deliver less than fifty grams of cocaine is a cognate lesser offense of conspiracy to deliver between 50 and 225 grams of cocaine. *Id.* Therefore, the trial court was not permitted to instruct on this lesser included offense. *Cornell, supra* at 357. The court did not err in failing to instruct the jury on the cognate lesser offense of conspiracy to deliver less than fifty grams of a controlled substance.

Defendant finally argues that his coconspirator's statement should not have been admitted into evidence because there was no independent proof of the conspiracy before the coconspirator's statement was admitted. To preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). In this case, defense counsel did not object to the coconspirator's testimony. Thus, the issue is not preserved for appeal. *Id.* We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved issue, defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the error affected defendant's substantial rights, i.e., affected the outcome of the trial court proceedings. *Id.* Reversal is only warranted when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

MRE 801(d)(2) provides, in pertinent part:

> A statement is not hearsay if . . . [the] statement is offered against a party and is (A) his own statement . . . or (E) a statement by a coconspirator of a party

> during the course and in furtherance of the conspiracy on independent proof of the conspiracy. [*People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990).]

MRE 104 and MRE 801(d)(2)(E) require that the underlying conspiracy be proven by a preponderance of independent evidence before a proffered coconspirator's statement may be placed before the trier of fact. *People v Burton*, 433 Mich 268, 281; 445 NW2d 133 (1989). During his testimony at trial, Bolton asserted that Sellors told him that he had purchased cocaine from this supplier (defendant) before and that the supplier was a porter at the car dealership where Sellors worked. Before Bolton's testimony, there was no link between defendant and the conspiracy. Because there was no independent evidence of defendant's involvement with the conspiracy prior to Bolton's testimony at trial, the evidence should not have been admitted at trial. However, while we believe plain error occurred in this case, the error did not affect defendant's substantial rights because the error in admitting Bolton's testimony was not outcome determinative. Even disregarding Bolton's statement's about defendant's role in the conspiracy, which should have been excluded from evidence, there was sufficient evidence of defendant's involvement in the conspiracy. Therefore, we conclude that any error involving Bolton's testimony regarding Sellors' statements did not affect defendant's substantial rights and was not outcome determinative.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello